STATE OF MINNESOTA

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May 20, 1992

Office of the Secretary
Federal Communications Commission
1919 M street, N.W.
Washington, D.C. 20554

Re: Telephone Consumer Protection Act of 1991
CC Docket No. 92-90

To whom it may concern:

Thank you for the opportunity to submit comments on the Commission's Notice of Proposed Rulemaking regarding the Telephone Consumer Protection Act of 1991.

The Minnesota Attorney General's Office sued a telemarketer in state court in 1990 for violating the Minnesota Automatic Dialing-Announcing Device statute. In October, 1991, the Minnesota Court of Appeals upheld the constitutionality of our statute. The case was argued to the Minnesota Supreme Court on April 1, 1992, and we are awaiting a decision.

Our office believes that automated solicitations amount to an invasion of privacy and we strongly support efforts to curb these calls. Our views on this matter are set forth in detail in our Supreme Court brief, which is enclosed with this letter. Also enclosed is a copy of the decision of the Court of Appeals upholding the constitutionality of our statute.

Please include this letter, along with our brief, as part of the official record in this matter. Thank you for the opportunity to participate in this rulemaking proceeding.

Sincerely,

JAMES P. JACOBSON
Special Assistant
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Consumer Division
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CI-91-598

Ramsey County
District Court #C6-90-12442
and #C6-90-12443

Forsberg, Judge

State of Minnesota, by its Attorney General, Hubert H. Humphrey, III,

Respondent,

vs.

Casino Marketing Group, Inc.,

Defendant,

Larry J. Hall, a/k/a "Bud Hall" d/b/a "721 Associates" and d/b/a "Associated Marketing,"

Appellant,

and

State of Minnesota, by its Attorney General, Hubert H. Humphrey, III,

Respondent,

vs.

Universal American Credit Card, Inc.,

Respondent,

Larry J. Hall, a/k/a "Bud Hall" d/b/a "721 Associates" and d/b/a "Associated Marketing,"

Appellant.

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Filed October 8, 1991
Office of Appellate Courts

S Y L L A B U S

The trial court did not abuse its discretion by enjoining appellant's use of automatic-dialing announcing devices which did not precede the recorded solicitations with a live operator identifying the entity for which the call was made, explaining the message's purpose, identifying the services or goods being promoted, and obtaining the consumer's consent, as required by Minn. Stat. §§ 325E.27 and .29 (1990).

Affirmed.

Considered and decided by Parker, Presiding Judge, Forsberg, Judge, and Amundson, Judge.

O P I N I O N

FORSBERG, Judge

Larry Hall appeals from the trial court's grant of respondent State of Minnesota's motion for a temporary injunction prohibiting him from using automatic-dialing announcing devices (ADADs). We affirm.

FACTS

Hall is a Minnesota resident doing business under the names "721 Associates" and "Associated Marketing." He is also the agent for Casino Marketing Group, Inc., a Nevada corporation, and Universal American Credit Card, Inc., a Texas corporation. Hall's businesses include conducting commercial telephone solicitations for the sale of travel services and credit cards to Minnesota

consumers, as defined in Minn. Stat. § 325E.26, subd. 4 (1990). These telephone solicitations are placed by ADADs which deliver prerecorded voice messages. The solicitations are placed without a live operator to announce the business' name, explain the message's purpose, or identify the services or goods being promoted. The calls are also placed without the prior consent of the called persons. It is undisputed that this type of telephone solicitation violates Minn. Stat. §§ 325E.27 and .29.

Upon discovering the unlawful solicitations, the state commenced two actions to enjoin Hall. A state investigator alleges by affidavit that during 1990, the attorney general received 805 written complaints concerning telemarketing, 60 of which involved prerecorded telephone solicitations.

In his affidavit, Hall claims his sole source of income is from using the ADADs. He acknowledges ADADs can be programmed to exclude telephone numbers of those who do not want unsolicited calls. Further, he insists enforcement of the present statute, which requires a live operator, removes any advantage from using ADADs.

The two cases were consolidated for hearing. Hall argued the statutory restrictions on using ADADs are facially unconstitutional and unconstitutional as applied to him. He also sought an injunction to restrain the state from enforcing the statute.

In granting the state's temporary injunction motion, and implicitly denying Hall's cross-motion, the trial court concluded: (1) Hall will unlikely prevail on his constitutional claim;

(2) nothing about the parties' relationship favors injunctive relief to Hall; (3) the state's public policy concerns in protecting its citizens outweighs Hall's interest in using the ADADs; and (4) no administrative burdens would hinder effective enforcement and supervision of the temporary injunction.

ISSUE

Did the trial court abuse its discretion by granting a temporary injunction restricting Hall's use of ADADs for commercial telephone solicitations?

ANALYSIS

The grant of a temporary injunction rests within the sound discretion of the trial court, and its decision will not be disturbed on appeal unless there has been an abuse of such discretion. Cherne Indus., Inc. v. Grounds & Assocs., Inc., 278 N.W.2d 81, 91 (Minn. 1979). In determining whether to reverse or affirm a grant of temporary injunction, an appellate court considers five factors: (1) the nature and background of the parties' relationship; (2) the relative harms to be suffered by the parties; (3) the likelihood of success on the merits; (4) public policy concerns; and (5) administrative burdens involved in judicial supervision and enforcement. Dahlberg Bros., Inc. v. Ford Motor Co., 272 Minn. 264, 274-75, 137 N.W.2d 314, 321-22 (1965).

The critical issue in this case is whether the state will likely succeed on its claim that Hall should be permanently enjoined. This issue in turn depends upon whether Hall will succeed in his claim that the ADAD statute violates the first

amendment. The first amendment extends protection to commercial speech. Bigelow v. Virginia, 421 U.S. 809, 821, 95 S. Ct. 2222, 2232 (1975). Commercial speech, however, only enjoys a limited measure of constitutional protection and is therefore subject to regulation impermissible in the realm of noncommercial expression. Board of Trustees v. Fox, 492 U.S. 469, 472, 109 S. Ct. 3028, 3033 (1989) (quoting Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447, 456, 98 S. Ct. 1912, 1918 (1978)).

The Supreme Court has set forth a four-part test to determine the lawfulness of restrictions on commercial speech. A court must determine whether (1) the speech deserves first amendment protection, (2) the asserted governmental interest is substantial, (3) the limitation "directly" advances the asserted governmental interest, and (4) the limitation is not more extensive than "necessary" to serve the governmental interest. Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n, 447 U.S. 557, 566, 100 S. Ct. 2343, 2351 (1980). A restriction on commercial speech must pass each of these to be constitutionally permissible. We believe the trial court in this case did not err in concluding Minn. Stat. §§ 325E.26-.31 likely meets the Central Hudson test, and therefore acted within its discretion in granting the state's temporary injunction motion.

First, illegal or misleading speech does not deserve constitutional protection. Id. at 563, 100 S. Ct. at 2350. While the state claims the telephone solicitations in this case are misleading, the trial court concluded there was insufficient

evidence at this stage of the proceedings to make such a determination. We therefore do not reach this issue. Of course, should the trial court find the solicitations are misleading, they would deserve no constitutional protection.

The second inquiry is whether the asserted governmental interests in restricting the use of ADADs are substantial. The statute requires that a live operator obtain the consumer's consent, explain the message's purpose, identify the services or goods promoted, and identify the entity for which the call is made before the outset of the recorded message. Minn. Stat. §§ 325E.27 and .29. The state offers two interests to justify these restrictions: to protect the privacy expectations of its citizens and to prevent fraudulent or misleading telephone solicitations.

We believe these interests are substantial. Citizens should enjoy a heightened degree of privacy in their own homes, and intrusions into residential privacy, such as the unsolicited telephone advertisements in this case, require immediate attention. See, e.g., Fox, 492 U.S. at 475, 109 S. Ct. at 3032 (preserving residential tranquility provides substantial governmental interest to prohibit demonstration of commercial product in university dormitories in face of first amendment challenge); Bread v. City of Alexandria, 341 U.S. 622, 645, 71 S. Ct. 920, 934 (1951) (court upheld conviction for selling magazine subscriptions in violation of city ordinance outlawing door-to-door solicitation). In addition, the state has a substantial interest in preventing

deceptive advertising and ensuring consumers receive accurate information when a telemarketer presents a solicitation.

With respect to the third inquiry, we conclude the requirement of a live operator advances the state's interests in privacy and preventing fraud. By requiring a live operator, the ADAD statute permits the consumer to decide at the beginning of the call whether the solicitation is worth interrupting her activities. Further, the consumer may ask questions of the operator to make informed decisions about the solicitation. In addition, by identifying the entity for which the call is made and explaining the call's purpose, the operator may alert the consumer to overreaching and deceptive sales practices.

Finally, the statutory restrictions on ADAD solicitations are not more extensive than necessary to serve the state's interests. This inquiry requires a reasonable "fit" between the legislature's aim and the means chosen to accomplish it. Fox, 492 U.S. at 480, 109 S. Ct. at 3035. The fit does not necessarily require the least restrictive means; instead, the means must be "in proportion to the interest served." Id. (quoting In re R.M.J., 455 U.S. 191, 203, 102 S. Ct. 929, 937 (1982)). In view of the intrusive effect of ADAD solicitations and the potential for fraud and overreaching, the legislature's decision to require a live operator amounts to a reasonable fit.

Two corollary issues also require our attention. First, Hall argues the trial court applied the improper legal standard in examining the validity of the ADAD statute. The trial court

concluded a strong presumption exists in favor of a statute's constitutionality and a statute's invalidity must be proved beyond a reasonable doubt. See Minneapolis Fed'n of Teachers v. Obermeyer, 275 Minn. 347, 356, 147 N.W.2d 358, 365 (1966). Generally, this presumption of constitutionality does not apply to laws restricting first amendment rights. Johnson v. State Civil Serv. Dep't, 280 Minn. 61, 66, 157 N.W.2d 747, 751 (1968). Nonetheless, plain commercial speech is not granted the high standard of protection other first amendment rights receive. Fox, 492 U.S. at 472, 109 S. Ct. at 3033. For this reason, statutes restricting commercial speech properly bear a strong presumption of constitutionality.

Second, Hall argues the ADAD statute is a prior restraint. Prior restraints on speech are not tolerated. See, e.g., New York Times Co. v. United States, 403 U.S. 713, 91 S. Ct. 2140 (1971). However, unlike illegal prior restraints, which entirely suppress the distribution of the protected communication, the ADAD statute in this case merely regulates the manner by which certain telephone solicitations may be presented to consumers.

D E C I S I O N

The trial court acted within its discretion by enjoining appellant's use of ADADs for commercial telephone solicitations.

Affirmed.

Dated: Sept 26, 1991

C1-91-598

STATE OF MINNESOTA

IN SUPREME COURT

STATE OF MINNESOTA,

RESPONDENT,

VS.

CASINO MARKETING GROUP, INC., AND LARRY J. HALL, ALSO KNOWN AS "BUD HALL," DOING BUSINESS AS "721 ASSOCIATES," AND DOING BUSINESS AS "ASSOCIATED MARKETING,"

AND

UNIVERSAL AMERICAN CREDIT CARD, INC., AND LARRY J. HALL, ALSO KNOWN AS "BUD HALL," DOING BUSINESS AS "721 ASSOCIATES," AND DOING BUSINESS AS "ASSOCIATED MARKETING,"

APPELLANT.

RESPONDENT'S BRIEF AND APPENDIX

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STATE OF MINNESOTA
IN SUPREME COURT

STATE OF MINNESOTA,
BY ITS ATTORNEY GENERAL,
HUBERT H. HUMPHREY, III,

RESPONDENT,

VS.

CASINO MARKETING GROUP, INC.,
AND LARRY J. HALL, ALSO KNOWN AS
"BUD HALL," DOING BUSINESS AS
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"721 ASSOCIATES," AND DOING
BUSINESS AS "ASSOCIATED MARKETING,"

APPELLANT.

RESPONDENT'S BRIEF AND APPENDIX

LEGAL ISSUE

Did the trial court act within its discretion in issuing a temporary injunction prohibiting appellant from violating the Minnesota Automatic Dialing-Announcing Device statute, and in refusing to issue a temporary injunction against the State to prohibit enforcement of the statute?

The trial court held in the affirmative.

The Court of Appeals held in the affirmative.

STATEMENT OF THE CASE

The Respondent accepts Appellant's Statement of the Case.

STATEMENT OF FACTS

In July, 1990, Abbott Northwestern Hospital in Minneapolis received hundreds of automated sales solicitations on patient and employee phones, including phones in the hospital's coronary care and intensive care units. Appellant's Appendix ("Appellant's App.") A68-A71. The automated calls contained promotions for a credit card offered by Universal American Credit Card, Inc. ("UACC") and a Las Vegas vacation offered by Casino Marketing Group, Inc. ("Casino Marketing"). Appellant's App. A68-A71. The solicitations continued every day for ten days, disturbing hospital patients and interfering with hospital business. Appellant's App. A70.

The calls for the UACC credit card purported to offer a $1,500 line of credit for those with poor credit histories, prior bankruptcies or no credit history at all. Appellant's App. A74. The Casino Marketing calls claimed to be on behalf of "KWIK 1000"

and implied that the recipient was the winner of a Las Vegas vacation. Appellant's App. A72. The solicitations for both UACC and Casino Marketing left telephone numbers for the recipient to call for further information. Appellant's App. A72, A74. Even after officials at Abbott Northwestern called the numbers for both UACC and Casino Marketing in an attempt to stop the automated solicitations, the calls continued to flow in to hospital phones. Appellant's App. A68-A71.[1]

Upon investigating the source of the calls to the hospital, the State discovered that the calls originated from the residence of appellant Larry Hall. Appellant's App. A63. The State filed a lawsuit, seeking an injunction to prevent Hall from continuing to disturb Minnesota residents with automated promotional calls. The automated solicitations violate the Minnesota Automatic Dialing-Announcing Device statute, Minn. Stat. §§ 325E.26-.31 (1990), which requires a live operator to introduce and to explain the purpose of the call and to receive the recipient's consent before playing a prerecorded message.

Each year, several hundred Minnesota citizens complain to the Attorney General's Office about harassment by automated sales promotions. Appellant's App. A109-A111. In November and December of 1990 alone, the Attorney General's telephone complaint lines received 166 consumer complaints about automated solicitations. Appellant's App. A111. Over an entire year, that

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1. Appellant incorrectly states that the "calls were made for only one day." Appellant's Brief at 7. The Affidavit of John LeBlanc, the Telecommunications Manager at Abbott Northwestern Hospital, establishes that repeated efforts to stop the calls were unsuccessful, and that the calls continued for at least ten days. Appellant's App. A69-A70.

figure projects to approximately 1,000 consumer calls. The Attorney General also received 805 written complaints against telemarketers in 1990, and 60 written complaints specifically involving automated sales solicitations. Appellant's App. A110. Typical complaints assert that automated solicitations constitute "an invasion of privacy," "malicious use of the telephone," and "harassment." Appellant's App. A112-A120.[2]

ARGUMENT

I. INTRODUCTION AND STANDARD OF REVIEW.

This case involves review of the trial court's temporary injunction prohibiting appellant from continuing to violate Minnesota's Automatic Dialing-Announcing Device statute (the "ADAD" statute), Minn. Stat. §§ 325E.26-.31 (1990). This statute regulates the use of automatic dialing-announcing devices for delivering commercial solicitations to residential telephones. Before a prerecorded solicitation may be played, an operator must identify the name of the company placing the call, explain the purpose of the call and the type of goods or services the message is promoting, and state that the message seeks solicitation or payment of funds. Minn. Stat. § 325E.29 (1990). The operator then must obtain the recipient's consent before playing the prerecorded message. Minn. Stat. § 325E.27 (1990). These requirements do not apply if the caller and the recipient have a

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2. Undoubtedly, the number of consumers who devote the time, energy and resources to register a formal complaint with the Attorney General's Office reflects a minute fraction, a tip of the iceberg, of the total number of consumers actually affected by the practice at issue. See, e.g., Consumer Protection Div., Office of the Attorney Gen. v. Consumer Publishing Co., 501 A.2d 48 (1985).

prior business or personal relationship. Id. The statute prohibits any commercial telephone sales pitch before 9:00 a.m. and after 9:00 p.m. Minn. Stat. § 325E.30 (1990).[3]

The trial court granted the State's motion for a temporary injunction to prohibit appellant from continuing to deliver automated solicitations to Minnesota residences in violation of the ADAD statute. Appellant's App. A129. In the same order, the court denied appellant's motion for an injunction against the State to prohibit enforcement of the statute. As the Court of Appeals correctly noted, the trial court's decision granting the State's motion for a temporary injunction and denying appellant's motion for a temporary injunction must be upheld absent an "abuse of discretion." Appellant's App. A4. See also Cherne Indus., Inc. v. Grounds & Assoc., Inc., 278 N.W.2d 81, 91 (Minn. 1979); Overholt Crop Ins. Serv. Co. v. Bredeson, 437 N.W.2d 698, 701 (Minn. Ct. App. 1989). The Court of Appeals affirmed the trial court's injunction, finding that the trial court "acted within its discretion by enjoining appellant's use of ADADs for commercial telephone solicitations." Appellant's App. A8.

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3. In December, 1991, the United States Congress passed the "Telephone Consumer Protection Act of 1991," which imposes a nationwide ban on the use of automatic dialing-announcing devices for placing commercial messages to residential telephones without prior consent. Telephone Consumer Protection Act of 1991, Pub. L. No. 102-243, 105 Stat. 2394 (to be codified at 47 U.S.C. § 227) (available in WESTLAW, US-PL database). Respondent's App. A1-A9. This Act explicitly provides for nonpreemption of state laws. 105 Stat. 2400 (section 227(e)(1)). Respondent's App. A7. The Act also allows the attorney general of any state to enforce the federal Act in federal court. 105 Stat. 2400 (section 227(f)). Respondent's App. A7-A8.

The State asserts in section II that the trial court properly acted within its discretion in enjoining appellant from violating the ADAD statute. In section III, the State establishes that the trial court correctly refused to enjoin the State from enforcing the statute, on the grounds that the statute protects residential privacy and prevents telemarketing fraud. For these reasons, the ADAD statute amounts to a reasonable regulation of commercial activity, and the trial court's injunction against appellant Hall must be upheld.

II. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN ISSUING A TEMPORARY INJUNCTION PROHIBITING APPELLANT FROM VIOLATING THE ADAD STATUTE.

A. The Trial Court Properly Acted Within Its Discretion In Enjoining Appellant from Continuing To Violate The ADAD Statute.

The appellant concedes that he operates automatic dialing-announcing devices to place automated commercial solicitations to Minnesota residents in violation of the ADAD statute. Since there is no factual dispute that appellant has been violating the statute, the trial court properly granted a temporary injunction to prohibit appellant from continuing to violate the statute.

Minn. Stat. § 8.31, subd. 3 (1990), specifically authorizes the Attorney General to seek injunctive relief when a consumer protection statute, including Minn. Stat. §§ 325E.26-.30 (1990), is being violated. When a statute explicitly provides for injunctive relief, an injunction is warranted upon a showing that statutory violations have occurred. As explained by the United States Court of Appeals for the Eighth Circuit, "[w]hen an

injunction is explicitly authorized by statute, proper discretion usually requires its issuance if the prerequisites for the remedy have been demonstrated and the injunction would fulfill the legislative purpose." United States v. White, 769 F.2d 511, 515 (8th Cir. 1985) (quoting United States v. Buttorff, 761 F.2d 1056, 1059 (5th Cir. 1985)). See also State v. Sirois, 478 A.2d 1117 (Me. 1984); Ackerman v. Tri-City Geriatric & Health Care, Inc., 378 N.E.2d 145 (Ohio 1978). Since Minnesota law explicitly provides for injunctive relief, the trial court properly exercised its discretion in enjoining appellant from continuing to violate the ADAD statute.[4]

B. Appellant's "Hardship" Claim Does Not Provide Grounds For Challenging The ADAD Statute.

Appellant's claim that income from operation of automatic dialing-announcing devices is his "sole source of livelihood" provides no basis for overturning the trial court's injunction. In Tepel v. Sima, 213 Minn. 526, 7 N.W.2d 532 (1942), the Minnesota Supreme Court explicitly rejected the notion that individual "hardship" provides a basis for challenging enforcement of a statute. In that case, the Court upheld application of the minimum wage law to a small bakery, explaining that the fact that "a statute of general applicability may work hardship in a particular case is no valid objection to

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4. The trial court granted a "statutory injunction" based upon a finding of violations of the ADAD statute. Appellant's App. A136. Appellant did not appeal the court's application of the statutory injunction standard. However, in upholding the injunction, the Court of Appeals applied the five-part test in Dahlberg Bros., Inc. v. Ford Motor Co., 272 Minn. 264, 274-75, 137 N.W.2d 314, 321-22 (1965). Under either analysis, the injunction was properly granted.

its application in that case." 213 Minn. at 536, 7 N.W.2d at 537. The rationale for this holding is obvious--if "hardship" provided grounds for nonenforcement of public protection laws, then any person whose livelihood depended upon illegal activity could make a "hardship" claim to prevent enforcement of valid state laws. Appellant's "hardship" claim therefore must be rejected.[5]

III. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN REFUSING TO ENJOIN THE STATE FROM ENFORCING THE ADAD STATUTE.

A. The ADAD Statute Involves Regulation Of Commercial Speech, Which Is Subject To Greater Restrictions Than Noncommercial Speech.

The automated telephone solicitations placed by appellant Hall for the UACC credit card and the Casino Marketing Las Vegas vacation involve "commercial speech." Appellant's automated calls, in fact, are nothing other than telephone "advertisements" for credit cards and vacations.

Commercial speech is subject to greater regulation under the first amendment than noncommercial speech. In Board of Trustees v. Fox, 492 U.S. 469, 109 S. Ct. 3028 (1989), the Supreme Court explained that "commercial speech [enjoys] a limited measure of protection, commensurate with its subordinate position in the scale of First Amendment values,' and is subject to 'modes of regulation that might be impermissible in the realm

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5. It should also be noted that appellant makes no claim that he was using automatic dialing-announcing devices at the time the ADAD statute went into effect. In fact, appellant states that he has been using these devices for "two years." Appellant's Brief at 7. The ADAD statute, however, went into effect in 1987, or five years ago.

of noncommercial expression.'" 492 U.S. at 477, 109 S. Ct. at 3033 (quoting Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447, 456, 98 S. Ct. 1912, 1918 (1978)).

The current standard for the regulation of commercial speech was set forth by the Supreme Court in Central Hudson Gas & Electric Corp. v. Public Service Commission, 447 U.S. 557, 100 S. Ct. 2343 (1980). The Court applied the following four-part analysis for evaluating commercial speech regulations:

> At the outset, we must determine [1] whether the expression is protected by the First Amendment. For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading. Next, we ask [2] whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine [3] whether the regulation directly advances the governmental interest asserted, and [4] whether it is not more extensive than necessary to serve that interest.

447 U.S. at 566, 100 S. Ct. at 2351. This four-part test for evaluating regulations on commercial speech is "'substantially similar' to the application of the test for validity of time, place and manner restrictions upon protected speech. . . ." Board of Trustees, 492 U.S. at 477, 109 S. Ct. at 3033 (quoting San Francisco Arts & Athletics, Inc. v. United States Olympic Comm., 483 U.S. 522, 537, 107 S. Ct. 2971, 2981 n.16 (1987)). Both of these tests "require a balance between the governmental interest and the magnitude of the speech restriction." San Francisco Arts & Athletics, 483 U.S. at 537, 107 S. Ct. at 2981 n.16.

Regulations on commercial speech will be upheld under the Central Hudson test unless such regulations are